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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1299

EDNA MAE BOOKER,

PETITIONER,

vs.

THE STATE OF KANSAS,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

EDNA MAE BOOKER,
PETITIONER,

vs.

THE STATE OF KANSAS,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner herein, prays, that a writ of certiorari issue to review the judgment issued in the above entitled case on December 9, 1967. Rehearing denied on January 5, 1968, and spread of record on January 8, 1968.

Upon consideration of the application of counsel for Petition, a stay of execution was granted pursuant to 28 U.S.C., 2101 (f) and Rules 18, 50 and 51 of this court, by the order of the Honorable Byron R. White, Associate Justice of the Supreme Court of the United States, dated February 5, 1968.

OPINION BELOW

The first opinion in this case appears as State of Kansas against Edna Mae Booker, 197 Kansas 13 415 P2 411, reproduced as Appendix A of this petition.

The second opinion appears as State of Kansas against Edna Mae Booker, 200 Kansas 166 ..... P2 ....., and is reproduced as Appendix B of this petition.

JURISDICTION

Petitioner believes and, therefore, states that this court has jurisdiction to review the above decisions of the Supreme Court of the State of Kansas for the reason that she was required to stand trial a second time on a charge made by information to murder in the first-degree after having once stood trial upon the same charge and having been convicted of manslaughter in the first degree only, which decision was reversed upon the first appeal as shown in Appendix A by the Supreme Court of the State of Kansas. The last decision of the State of Kansas was made on January 5, 1968, spread of record on January 8, 1968 as shown in the certified record of the Supreme Court of the State of Kansas filed herewith. The statutory provisions resting jurisdiction in this court is 28 U.S.C. 1257, the pertinent portion of which reads:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . (3) by writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of . . . The United States.

QUESTION PRESENTED

Whether it constituted a violation of the Fifth and Fourteenth Amendments to the Constitution of the United States to place a defendant on trial in State proceedings for the crime of first-degree murder when at a previous trial for first-degree murder, the defendant had been found guilty of first-degree manslaughter only. Upon appeal from that conviction, the Supreme Court of the State of Kansas reversed and directed a new trial.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

On the 8th day of March, 1965 during a family altercation, Edna Mae Booker, petitioner herein, shot her husband, James T. Booker, with a 25-calibre pistol at their home in Wichita, Sedgwick County, Kansas, thereby causing his death. During the course of these people's marriage dating from 1952, there had been many previous instances where the deceased had, in a rage and without any real cause, beaten the petitioner violently. These beatings on several occasions, necessitated petitioner's hospitalization. As a result of the death of James Booker, the State of Kansas filed the information charging the petitioner with first-degree murder. Her trial was commenced on April 27, 1965 and on the 30th day of April, 1965 after a jury trial, she was found guilty by the jury of the offense of first-degree manslaughter which under the law of Kansas, is a lesser included offense. Her conviction was appealed to the Supreme Court of the State of Kansas. The Supreme Court of the State of Kansas reversed her conviction with directions to the trial court to grant her a new trial. A copy of the Supreme Court's decision in that case is reproduced as Appendix A of this petition, dated June 11, 1966.

The petitioner was then put to trial a second time on the charge of first-degree murder upon the original informa-

tion upon which she had originally been tried and convicted of first-degree manslaughter. On the 23rd day of November, 1967, the petitioner was again found guilty of the offense of first-degree manslaughter by a jury. Appeal was again taken to the Supreme Court of the State of Kansas, which court affirmed her conviction. A copy of the court's opinion dated December 9, 1967 is reproduced as Appendix B of this petition. Order denying rehearing dated January 5, 1968 and spread of record January 8, 1968 made Appendix C.

Prior to the commencement of the second trial, petitioner orally objected to being tried a second time on a charge of first-degree murder alleging that this was in violation of the Constitution of the United States and particularly Amendment No. 5, as said amendment is operative upon the states by and through the 14th Amendment to the Constitution. This motion and argument was overruled by the trial court. Motion and ruling shown as Appendix D of this petition.

The motion for a new trial came on for argument on the 23rd day of November, 1967 where the constitutional objection was again raised and again overruled by the trial court, shown herein as Appendix E of this petition. Thereafter, judgment was rendered by which the petitioner was sentenced to serve a term in the Kansas State Industrial Farm for Women for not less than five but not more than twenty-one years. On appeal, the question of double jeopardy was again raised and was overruled by the Supreme

Court of the State of Kansas as set out above, particularly as follows:

> Did the court err in requiring the defendant to stand trial on a charge of first-degree murder after having previously been convicted of manslaughter in the first degree in a previous trial wherein she was tried for first degree murder?
>
> While the Defendant is aware of this Court's ruling in *Cox vs. State,* 197 Kan. 395, and the cases cited therein, the Defendant would nevertheless ask that the Court reconsider its position in that case and would overrule *Cox vs. State* and hold that the Defendant was actually placed twice in jeopardy under the decision of the Supreme Court of the United States in *Green vs. United States,* (1957), 355, U.S. 184, 2 L. Ed. 2d 199, 78 S. Ct. 221, 61 A.L.R. 2d 1119, and *United States (ex rel. Hetenyi) v. Wilkins,* (2nd Cir., 1965), 348 F. 2d 844.

The position of the court was stated as follows:

"Finally, defendant claims error in being required to stand trial on a charge of murder in the first degree after having been previously convicted of manslaughter in the first degree in a previous trial when she was tried for first degree murder. The question is settled by our opinion in the recent case of *Cox v. State,* 197 Kan. 395, 416 P. 2d 741, wherein we reaxamined the position of this court with regard to the statutory framework within which a new trial is granted in this state. Further comment is unnecessary.

Motion for rehearing was filed on the 28th day of

December, 1967, which motion was overruled by the Supreme Court of the State of Kansas by order dated January 5, 1968 and spread of record on January 8, 1968.

Attention is also called to Instruction No. 3 given to the jury in the first trial as follows:

"The laws of the State of Kansas provide as follows:

'Upon an indictment (and the same applies to an Information) for an offense consisting of different degrees the jury may find the defendant not guilty of the degree charged in the indictment (or Information) and guilty of any degree inferior thereto.'

The information in this case charges the defendant with murder in the first degree. This charge includes not only murder in the first degree but murder in the second degree, manslaughter in the first degree, manslaughter in the third degree and manslaughter in the fourth degree.

You should therefore first determine whether, under the evidence and instructions of the court, the defendant is guilty of murder in the first degree. If the defendant is not proved to your satisfaction beyond a reasonable doubt to be guilty of murder in the first degree, then you should proceed to determine whether she is guilty of murder in the second degree beyond a reasonable doubt. If the defendant has not been proved to your satisfaction beyond a reasonable doubt to be guilty of murder in the second degree you should then consider whether or not she has been proved to be guilty of manslaughter in the first degree beyond a reasonable doubt. If the defendant has not been proved to your satisfaction beyond a reasonable doubt to be guilty of manslaughter in the first degree, you

should then consider whether she has been proved guilty of manslaughter in the third degree. If you determine that she has not been proved guilty of manslaughter in the third degree you should then consider whether or not she has been proved guilty of manslaughter in the fourth degree beyond a reasonable doubt; if you do not find the defendant guilty of any of the charges, you will return a verdict of not guilty. Different forms of verdict will be furnished for your use. You should use the form of verdict that meets with the approval of every member of the Jury."

Petitioner shows to the honorable court that the Federal question which is herein sought to be reviewed was first raised by an oral pre-trial motion, next in the motion for a new trial before the trial court, next as a particular point in the appellant court and lastly, in the motion for rehearing, all as shown by the exhibits appended hereto.

SUMMARY OF ARGUMENT

It is believed that the Supreme Court of the United States has for all intents and purposes, promulgated a rule that the 14th Amendment is and shall hereafter be effective to cause the first ten amendments to the Constitution of the United States to be operative upon state proceedings through what is commonly referred to as the privileges and immunities clause and the due process clause and the equal protection clause of the said 14th Amendment. In this court's decision in *Green against United States,* 355 U.S. 184, 78 S. Ct. 221 and *United States (ex rel. Hetenyi) against Wilkins,* (2nd Cir., 1965), 348 F. 2d 844. Certiorari denied. This court has held that by virtue of the jeopardy clause of

the 5th Amendment to the Constitution of the United States, reprosecution is prohibited upon an original charge where a conviction of a lesser included charge is reversed upon appeal. The position of this court is so taken upon what might well be called the doctrine of acquittal by implication.

It is believed that this doctrine is particularly true when it is considered that the jury in the state proceedings is instructed to first determine whether or not a defendant and in this case, your petitioner, was guilty or not guilty upon the greater degree of the crime charged before making a decision upon the crime of which petitioner was convicted. It is believed particularly that the State of Kansas in reaffirming the decision made in 1871 in the case of *State against McCord,* 8 Kansas (Second Edition), 232, and thereafter following the cases within the State of Kansas and particularly the statutory provisions now known as Kansas Statutes Annotated, Section 62-1601 and 1602, would be contrary to the doctrine promulgated by this court.

REASONS FOR GRANTING THIS WRIT

It was a violation of this petitioner's rights under the 5th Amendment to the Constitution of the United States as made operative by the due process clause, the equal protection clause and the privilege and immunities clause of the Constitution of the United States to be placed on trial a second time for the same crime of which she had been acquitted by implication by a jury drawn under the proceedings of a trial court of the State of Kansas.

IT IS MOST DIFFICULT to determine how a citizen of the United States could be so without being also a citizen of one of the respective states and it is most difficult to discern how a citizen of one of these United States would have less privileges, immunities, rights, equal protection and due process of law than another.

In view of the trend in recent years toward giving real meaning and substance to the constitutional rights of this nation, it would appear that this court should and would now decide that a citizen of the State of Kansas is as much entitled to those rights as is a citizen of any other state and that each and all of them would find as was stated by this court in *Green, supra.*, that under the 5th Amendment's prohibition against double jeopardy, an individual is protected by the law of this nation from being subjected to the hazards of trial and possible conviction more than once for the original alleged offense so that having once by implication been found not guilty by a jury of a higher-grade of offense, a state is thereafter barred from placing a defendant upon trial for a higher-grade of offense than that of which the citizen was originally convicted and that any less decision on the part of this court or the Supreme Court of the State of Kansas constitutes a deprivation of petitioner's rights under the Constitution of the United States.

CONCLUSION

For the foregoing reason, petitioner respectfully prays that a writ of certiorari should issue herein.

Russell Shultz
Larry Kirby
Attorneys for Petitioner

APPENDIX A

No. 44,332

STATE OF KANSAS,
Appellee,
v.
EDNA MAE BOOKER,
Appellant.

SYLLABUS BY THE COURT

Where the defendant is being tried on a charge of murder in the first degree, the giving of an instruction pertaining to the prohibition of carrying a concealed weapon, as provided in K.S.A. 21-2411, without any limitation or explanation as to the application thereof to the case on trial is error; and where it appears the substantial rights of defendant may have been prejudiced thereby the verdict must be set aside and a new trial granted.

Appeal from Sedgwick district court, division No. 3; B. MACK BRYANT, judge. Opinion filed June 11, 1966. Reversed with directions.

Russell Shultz, of Wichita, argued the cause, and *Larry Kirby,* of Wichita, was with him on the briefs for the appellant.

A. J. Focht, Deputy County Attorney, argued the cause, and *Robert C. Londerholm,* Attorney General, and *Keith Sanborn,* County Attorney, were with him on the briefs for the appellee.

The opinion of the court was delivered by

KAUL, J: Edna Mae Booker was charged in the district court of Sedgwick County with the murder of her husband, James Booker, by shooting him with a pistol at 5 p.m. on March 8, 1965. She was tried by a jury and convicted of manslaughter in the first degree, K.S.A. 21-407. She has appealed and complains principally of instructions given, instructions refused and the admission into evidence of certain Exhibits by the trial court.

A narration of events leading up to the homicide involves the stormy married life of the defendant and her deceased husband.

The Bookers were married in 1952. They were in their middle thirties at the time of the fatal shooting. Edna had one child, Wilda Jean Farley, by another man, prior to their marriage, and three children were born to the Bookers during their marriage.

The Bookers had lived in Wichita for eight years. During that time James had been steadily employed at the Boeing Airplane Company except for a layoff he was experiencing at the time of his death. The defendant was employed as a waitress in a restaurant in Wichita.

The Bookers experienced frequent arguments and considerable dissension during the course of their marriage. On several occasions their arguments progressed from vocal to physical conflict. After one such event, on Halloween night of 1964, the defendant was hospitalized for several days.

During a period of approximately one year preceding the final marital conflict, the defendant was keeping company with another man, Charles F. McElroy. McElroy was a Sergeant in the Air Force stationed at McConnell Air Force Base in Wichita. The defendant admitted she had spent a night with Sergeant McElroy in the same motel room in the Holiday Inn Motel in Kansas City and that she had stayed with him in a motel in Wichita on two or three occasions.

The defendant's association with Sergeant McElroy precipitated the final and fatal affray between the Bookers. The defendant saw Sergeant McElroy on the night of March 7, 1965, and returned to the Booker home about 1 a.m. on March 8. No lights were on in the house but the decedent was sitting on the divan waiting for defendant. Decedent accused Edna of seeing another man. An argument ensued which developed into an altercation resulting in bruises on defendant's arms and legs and a black eye. The defendant testified that she remained up the rest of the night; went to work the next morning and took the small .25 caliber pistol with her. During the day the decedent called and told her he had found the receipt from the motel in Kansas City. After she returned home from work the argument continued during a trip to the grocery store. After returning from the grocery store the defendant went into the bedroom and transferred the pistol from her purse to a pocket in her dress. She returned to the living room and told her husband that she had the pistol. Defendant testified she was sitting on the divan when the decedent got up

and came toward her appearing quite angry and that before he reached her she took the pistol from her pocket and fired. She testified that Booker grasped her hand in which she held the pistol and then wrestled around with her. During the struggle a lamp was broken. She did not know how many times the pistol was fired but she did fire at him and he fell to the floor in front of the divan.

The postmortem revealed there were four slugs in the body of decedent, one in each cheek, one in the left shoulder area and one in the left lateral chest wall. Dr. Carl Neudorfer, a pathologist, testified that the latter two bullets pierced vital organs and caused the death of decedent.

The defendant reported the shooting to the Wichita Police Dispatcher. The police arrived at the Booker home a few minutes after the shooting. Mrs. Booker was taken to police headquarters where she admitted the shooting but claimed her husband was attacking her and that she was fearful of him. She was then charged as heretofore indicated and after a preliminary hearing tried in the district court.

Promptly after the verdict was returned, counsel for defendant announced that he wished to file a motion for a new trial and a motion was filed within the time allotted by the court. Three points were raised in the motion for a new trial, but at the hearing defendant's counsel announced that one point was abandoned. The remaining points concerned the admission of an Exhibit in connection with the autopsy and alleged erroneous instructions given by the court.

The appellant insists that the giving of the instruction No. 11 is reversible error. It is as follows:

> "Section 21-2411 of the Revised Statutes of Kansas, 1949, provides that no person who is not an officer of the law, or a deputy to such officer shall carry on his person in a concealed manner any pistol or other deadly weapon."

The appellant was charged in the information with murder in the first degree. The jury was correctly instructed that the charge of murder in the first degree in this case included murder in the second degree and manslaughter in the first, third and fourth degrees. The appellant was not charged directly or indirectly with the crime of carrying a concealed weapon.

The general rule that instructions should be confined to issues made by the pleadings and should not be broader or narrower than the information (23A C.J.S., Criminal Law, §1311, p. 759) has been consistently adhered to in this jurisdiction. Instructions given in violation of the rule have never been condoned although excused in cases where it was found that the substantial rights of the defendant were not prejudiced as in *State v. Thompson,* 119 Kan. 743, 241 Pac. 110, and in *State v. Barbour,* 142 Kan. 200, 46 P. 2d 841. See also *State v. Whitaker,* 35 Kan. 731, 12 Pac. 106, and *State v. Tawney,* 81 Kan. 162, 105 Pac. 218.

The appellant argues that under the authority of *State v. Hartsock,* 140 Kan. 428, 37 P. 2d 36, the giving of the challenged instruction must be held reversible error. We are constrained to agree with appellant's contention.

In the *Hartsock* case the charge was also first degree murder and the instruction given concerning the carrying of a concealed weapon was substantially the same as that submitted in the instant case. In reversing the judgment, and in directing a new trial, in the *Hartsock* case it was stated:

> ". . . The case at bar is where in addition to fully instructing the jury as to the crime the court gave the jury an additional instruction concerning a crime not included in the charge, and which the defendant had no reason to believe would be given. R. S. 62-1447 requires that the court in charging the jury must state to it all matters of law which are necessary for its information in reaching its verdict. The criminal feature of carrying a concealed weapon was not necessary for the information and instruction of the jury in this case in arriving at its verdict. It was excused in the Post case when it was distinctly made to apply only to the evidence as showing an intention, and the jury was warned therein that the defendant was not on trial for carrying a concealed weapon.
>
> "A number of decisions of this court make it incumbent upon the defendant to propose or request instructions along certain lines and theories, but our attention has not been directed to any cases where this duty is imposed upon the defendant concerning an instruction as to a crime not charged in the information. Neither would it seem to be necessary for defendant to request the modification of an instruction giving an abstract statement of law not related to the crime charged." (pp. 431, 432.)

Our attention has been directed to two other cases in which an instruction pertaining to the concealed weapon statute was given. In a murder case, *State v. Post*, 139 Kan. 345, 30 P. 2d 1089, the instruction was approved where the jury's consideration was limited to the purpose of determining intention. The instruction read:

> "... it was a misdemeanor for defendant to carry on his person in a concealed manner the pistol introduced in evidence, but that defendant was not on trial for that offense; and evidence purporting to show he did carry a concealed weapon could be considered only for the purpose of determining defendant's intention in carrying the weapon ..." (p. 350.)

It was pointed out in the *Hartsock* opinion the instruction in the *Post* case carefully limited the jury's consideration of the instruction and explained the application to the issue of determining intention. Coupled with the limitation and explanation of the jury's consideration, as was done in the *Post* case, the instruction would not have been objectionable here.

A similar instruction was considered in *State v. Barbour*, supra, where it was held:

> "In a prosecution for murder it was error for the court to instruct the jury respecting the offense of carrying concealed weapons, since that offense was not contained within the charge on which defendant was being tried. In view of the fact that no objection was made to the instruction in the court below, that this point was not stressed in the argument, or elsewhere in the trial, and that it could have had but little bear-

ing under the facts of this case, it is held the error does not require or justify a reversal." (Syl. ¶ 3.)

The error cannot be excused in the case at bar as it was in the *Barbour* case.

The instruction was not objected to when given in the case at bar but the question was specifically raised before the lower court in the motion for a new trial and argued at the hearing. Further, in the instant case, the county attorney stressed the matter to the jury in his closing argument. A part of his argument on this point is:

"She shot and killed him with a dangerous and deadly weapon, the pistol, no question about that, she shot him. No question about that. Was she justifiably armed with a pistol? No. She was in violation of a positive command of law. You, you, you, you, her, nobody except a duly constituted officer of the law in this State can carry concealed pistols."

The instruction in this case was not qualified or limited in its application to the issue of appellant's intention, and the error in submitting the instruction in the form given was enhanced by the remarks of the county attorney in the final argument. Therefore, we are unable to say the substantial rights of the appellant were not affected. *Since our conclusion on this point requires a reversal of the judgment and the granting of a new trial it is unnecessary to consider and pass upon other assignments of error.*

The judgment is reversed with directions to grant a new trial.

APPENDIX B

No. 44,902

STATE OF KANSAS,
Appellee,
v.
EDNA MAE BOOKER,
Appellant.

SYLLABUS BY THE COURT

The record in a criminal action, wherein the defendant was charged with murder in the first degree and convicted by a manslaughter in the first degree, is examined and it is *held:*

1. The trial court did not err in admitting in evidence photographs of the body of deceased and testimony of defendant's behavior subsequent to the crime.

2. Instructions defining self-defense, justifiable homicide, reasonable doubt and explaining and limiting consideration to be given to the carrying of a concealed weapon by defendant; were not erroneous.

3. The trial court did not err in requiring defendant to stand trial on a charge of murder in the first degree.

4. The trial court did not err in denying defendant's motions for discharge and a new trial.

Appeal from Sedgwick district court, division No. 3; B. MACK BRYANT, judge. Opinion filed December 9, 1967. Affirmed.

Russell Shultz, of Wichita, argued the cause, and *Larry Kirby,* of Wichita, and *Leonard Watkins,* of El-Dorado, were with him on the briefs for the appellant.

Donald Foster, Deputy County Attorney, argued the cause, and *Robert C. Londerholm,* Attorney General, *Keith Sanborn,* County Attorney, and *A. J. Focht,* Deputy County Attorney, were with him on the briefs for the appellee.

The opinion of the court was delivered by

KAUL, J.: This is a second appeal by the defendant, Edna Mae Booker, from a second conviction of first degree manslaughter. Our opinion in the first appeal is reported in *State v. Booker,* 197 Kan. 13, 415 P. 2d 411, and will be referred to in the course of this opinion.

The defendant was charged with the first degree murder of her husband, James Booker, by shooting him with a pistol at 5 p.m. on March 8, 1965, in their home in Wichita. She was tried by a jury and convicted of manslaughter in the first degree. (K. S. A. 21-407.) On appeal the first conviction was reversed and the case remanded for a new trial. The defendant was again tried on a charge of first degree murder and again convicted of manslaughter in the first degree. Defendant's motion for a new trial was heard and overruled and thereafter the current appeal was perfected.

The essential facts of the unhappy married life of defendant and her deceased husband were related in our first opinion and will not be repeated in detail. The evidence at the second trial was essentially the same as that

submitted in the first trial and, as summarized in our first opinion, is incorporated by reference herein. Pertinent portions of the evidence, relative to the issues raised in the current appeal, will be pointed out in the course of this opinion.

The final and fatal affray between defendant and the deceased stemmed from marital conflict involving defendant's admitted infidelity with another man, Charles F. McElroy a Sergeant in the Air Force. The theory of the prosecution, as presented in the trial, was that McElroy obtained the pistol used in the shooting, gave it to defendant, and planned with her to arrange a situation in which the husband could be disposed of by defendant while acting in self-defense. The prosecution claimed defendant provoked her husband into the affray and then armed herself and killed him rather than leaving through the front door of the house which opened from the room in which the shooting took place.

The defendant claims she acted in self-defense. At the trial she advanced as her theory the proposition that because of previous threats and physical abuse by her husband she was in danger of harm to her person in the final encounter and, therefore, justified in firing the fatal shots in self-defense.

Ten points of error are specified by defendant and will be considered in the order presented.

Defendant first contends the court erred in admitting in evidence two photographs of the body of the deceased.

The exhibits complained of are black and white photographs taken during a postmortem examination of the body of deceased. Defendant admits in her brief that a proper cautionary instruction was submitted in which the jury was admonished not to allow the appearance within the photographs to cause passion or prejudice in their minds against the defendant. The sole argument advanced on this point is that the photographs were unnecessary to show the cause of death and were introduced solely to inflame the minds of the jurors.

The photographs were used by Dr. Karl M. Neudorfer a pathologist, who performed the autopsy to demonstrate to the jury the paths taken by the bullets through the body of the deceased. Under the opposing theories advanced by the parties during the trial of the case the relative positions of the victim and defendant at the time of the shooting became one of the controlling issues. Dr. Neudorfer testified in considerable detail as to the relative position of the gun and the body of deceased and demonstrated by using the photographs to show the paths of the bullets in explaining his conclusions. The photographs for such purposes were obviously relevant and material. Even though gruesome, photographs properly identified, as representing physical objects which constitute a portion of a transaction which serve to unfold or explain it, may be exhibited in evidence whenever the transaction is under judicial investigation. *(State v. Zimmer,* 198 Kan. 479, 426 P. 2d 267, cert. den. [36 U.S. Law Week, Misc. 552, p. 3189] ____ U. S. ____, ____ L. Ed. 2d ____, ____ S. Ct.

_____; *State v. Turner,* 193 Kan. 189, 392 P. 2d 863; *State v. Stubbs,* 186 Kan. 266, 349 P. 2d 936, cert. den. 363 U. S. 852, 4 L. Ed. 2d 1734, 80 S. Ct. 1632; *State v. Spencer,* 186 Kan. 298, 349 P. 2d 920; *State v. King,* 111 Kan. 140, 206 Pac. 883; *State v. Sweet,* 101 Kan. 746, 168 Pac. 1112.)

Defendant next makes a twofold attack on the trial court's instruction on first degree manslaughter. It is first argued the instruction should not have been given at all and second that the instruction given was incorrect. Defendant argues there was insufficient evidence here to justify the instruction. As we have indicated, prosecution evidence related in our opinion in the previous appeal is substantially the same as that disclosed in the record here. In the previous opinion *(State v. Booker,* supra.), *after* reviewing the evidence, we stated:

> ". . . The jury was correctly instructed that the charge of murder in the first degree in this case included murder in the second degree and manslaughter in the first, third and fourth degrees. . ." (p. 15.)

While instructions given should be based on the evidence in the case *(State v. Jensen,* 197 Kan. 427, 417 P. 2d 273; *State v. Diggs,* 194 Kan. 812, 402 P. 2d 300; *State v. Linville,* 148 Kan. 142, 79 P. 2d 869.) in a homicide prosecution where the evidence presents circumstances from which a lower grade of homicide might be inferred the court must instruct in such lower degree. We believe, under the evidence before the trial court in this case, failure to so instruct would have amounted to revers-

ible error in a prosecution for first degree murder. Eye witness testimony of the shooting consisted of only that of defendant and a view of a part of the shooting by Wilda Farley. Wilda is a daughter of defendant by a previous marriage. Her age is not shown, however, she testified she was in the seventh grade in Junior High School. She was in the kitchen when she heard her mother and stepfather arguing. When she heard a gun shot she ran into the living room. Her testimony is narrated by defendant as follows:

> "... she went into the living room and saw her Mother and Father struggling over the gun over in the corner of the living room. She said she ran into the living room and saw the lamp fall and heard it break and she got the smaller children and took them behind the planter or into the kitchen. She said that when she ran into the living room that her Father had said 'Your Mother has shot me' and he was lying in front of the couch and he sort of doubled up and then straightened out. She quoted the Decedent as saying her Mother was trying to kill him. She stated further that she saw her Mother fire the gun and the bullet hit the table and ricocheted off the table at the time when the Decedent was on the floor. She said that her Mother was standing by the stereo at the time the Decedent was lying on the floor. She was firing the gun; she didn't know how many times the gun had fired but the defendant was standing up crying and immediately went in and called for an ambulance in the kitchen. ..."

Defendant described the shooting as narrated in her abstract in the following manner:

"When she arrived home from work she was met by

> the decedent who insisted that they go to the store. When they returned the defendant ask her daughter to prepare supper. The defendant went into the bedroom and left her purse but because of the abusive language that the decedent was using she placed the gun in her coat pocket, loaded and with safety catch off. When the decedent kept up his abusive name calling and language she told him that she had a gun. She did so because she hoped that this would control him as she was unable to get out of the house or to get to a phone to call a policeman. He kept calling her names and then came for her saying, 'If you don't get out, right out of here I'm going to ___,' at this point she pulled the gun and fired. The next shot was fired while they were scuffling and she was across a chair, but she does not know when the rest of the shots were fired but that she remembers that after the second shot she told the decedent that there were more shots in the gun. She testified that she started pulling the trigger as soon as she was loose from him but that she did not see him fall. When she opened her eyes he was on the floor.

She also denied any plan or intent to kill the deceased.

On cross-examination she admitted her husband might not have heard when she told him she had a gun. She also admitted her affair and sexual intercourse with Sergeant McElroy. She further testified that she had considered a divorce because she had no feeling left for her husband.

Dr. Neudorfer testified that in the case of three of the wounds the gun would necessarily have been higher

than the entrance of the bullets into the body and that none of these three were contact wounds.

The prosecution also offered testimony of several acquaintances and neighbors of the parties as to the relationship of defendant and Sergeant McElroy and conversations with defendant in which she stated she no longer felt any need to have a relationship with deceased.

Under the evidence, as developed in this case, what was the state of defendant's mind, were the shots fired in self-defense and who was the aggressor, were all questions for the jury. In such cases much is left to inference and when the circumstances afford grounds for an inference of a lower grade of homicide the court cannot refuse to instruct in such lower degree. (*State v. Allen*, 98 Kan. 778, 160 Pac. 795; *State v. Truskett*, 85 Kan. 804, 118 Pac. 1047; *State v. McAnarney*, 70 Kan. 679, 79 Pac. 137.)

Our statute K. S. A. 21-407, defining manslaughter in the first degree, with reference to the question presented here, was first construed in *State v. Spendlove*, 47 Kan. 160, 28 Pac. 994 (1891). It was held:

> "Section 12, Chapter 31, of the act relating to crimes and punishments, (¶2133, Gen. Stat. of 1889,) is expressly applicable to all crimes or misdemeanors, not amounting to a felony, and an assault and battery is within the statute. Intentional violence upon the person killed is not excluded by the statute." (Syl. ¶2.)

The construction given to the statute in *Spendlove* was followed in *State v. Merriweather*, 136 Kan. 337, 15 P. 2d 425, where - as here - the charge was first degree

murder and the conviction was first degree manslaughter. In discussing the matter with which we are concerned it was stated:

"As indicated, the jury found defendant guilty of manslaughter in the first degree, instead of guilty of murder in the first degree. The conviction necessarily rested on an instruction given pursuant to R. S. 21-407, applicable if the jury should find defendant was engaged in the perpetration of, or an attempt to perpetrate, a crime or misdemeanor not amounting to a felony. Defendant complains because manslaughter in the first degree was thus submitted to the jury. The evidence was susceptible of an interpretation warranting the instruction. It was not necessary that the 'crime or misdemeanor not amounting to a felony' should be independent of and separate from the homicide, and defendant would have had good ground to complain if the instruction had not been given. *(State v. Spendlove,* 47 Kan. 160, 28 Pac. 994; *State v. Bassnett,* 80 Kan. 392, 102 Pac. 461.) In case of murder in the first degree, committed in perpetration of or attempt to perpetrate 'arson, rape, robbery, burglary or other felony' (R. S. 21-401), the elements constituting the 'other felony' must be distinct from the homicide itself, the same as when arson, rape, robbery or burglary is involved. *(State v. Fisher,* 120 Kan. 226, 243 Pac. 291.)" (pp 338, 339.)

In the instant case, after giving a general preliminary instruction to the effect that where an offense charged consists of different degrees the jury may find the defendant not guilty of the degree charged and guilty of any

degree inferior thereto, the court proceeded to recite the statutory definition of manslaughter in the first degree and later defined the critical terms set out in the statute. We believe the jury was adequately informed as to the elements of manslaughter in the first degree in the instruction referred to and that the evidence was sufficient not only to warrant but require the submission thereof.

The defendant next complains of the submission of Instruction No. 15. It reads:

> "You are instructed that it is against the laws of the State of Kansas for one not an officer of the law or a deputy under such officer, to carry on their person in a concealed manner a pistol or any other deadly weapon.
>
> "You are further instructed that the defendant in this case, Edna Mae Booker, is not on trial for carrying a concealed weapon. Evidence purporting to show she did carry a concealed weapon can be considered by you only for the purpose of determining defendant's intention in carrying the weapon."

In defendant's first appeal complaint was made concerning the concealed weapon instruction. We reversed for the reason the admonition limiting the jury's consideration only for the purpose of determining defendant's intention in carrying the weapon was omitted. *(State v. Hartsock,* 140 Kan. 428, 37 P. 2d 36.) The error was rectified in this trial. *(State v. Post,* 139 Kan. 345, 30 P. 2d 1089.) In a prosecution for murder in the first degree where theories of the prosecution and defense are developed, as they were by the evidence in this case, we do not believe

the instruction is prejudicial when its application is properly limited to the issue of intent.

Defendant next complains as to the trial court's Instruction No. 18 concerning self-defense. It is admitted the instruction is a correct statement of law but defendant complains the final paragraph is not applicable to this case and is prejudicial to the defendant. Defendant argues there was no evidence whatsoever that she was the aggressor. The state argues that the evidence is sufficient for the jury to infer the defendant armed herself and deliberately precipitated a situation where she knew it might be necessary for her to use the pistol. Defendant by her own testimony admitted that early in the fatal affray deceased told her to leave and that she remained. Defendant's daughter, Wilda Farley, testified that when she came in the room she saw her mother standing over the deceased shooting the gun down at the floor toward him. A scrutiny of the evidence leads us to believe that a fair question as to who was the aggressor remained for the jury's determination. Under such circumstances the portion of the instruction complained of was appropriate.

Defendant cites the case of *State v. Ridge*, 144 Kan. 402, 61 P. 2d 109, in which a self-defense instruction, somewhat similar to that submitted here, was held erroneous. The cases are clearly distinguishable. In *Ridge* there was no evidence tending to show defendant provoked the affray resulting in the homicide. In fact, the evidence in *Ridge* disclosed defendant was attempting to avoid even meeting the victim. Under the facts in *Ridge* there was no

jury question as to who was the aggressor. The instruction on self-defense submitted here substantially conforms to that approved in *State v. Ball,* 110 Kan. 428, 204 Pac. 701. Discussion of the application of an instruction on self-defense, where a defendant is the aggressor or where the question of who is the aggressor is to be resolved, may be found in *State v. Pfeifer,* 143 Kan. 536, 56 P. 2d 442; *State v. Allen,* 107 Kan. 407, 191 Pac. 476; *State v. Schroeder,* 103 Kan. 770, 176 Pac. 659; and *State v. Yeater,* 95 Kan. 247, 147 Pac. 1114.

Defendant also complains of Instruction No. 13 dealing with justifiable homicide. The court instructed generally in the terms of the statute (K.S.A. 21-404):

> "Section 21-404 of the Kansas Statutes Annotated provides:
>
> " 'Homicide shall be deemed justifiable when committed by any person in either of the following cases: First, in resisting any attempt to murder such person, or to commit any felony upon him or her in any dwelling house in which such person shall be or second, when committed in the lawful defense of such person when there shall be a reasonable cause to apprehend a design to commit a felony or to do some great personal injury and there shall be immediate danger of such design being accomplished.' "

Defendant argues the instruction given is not clear and requested the addition of the following two paragraphs:

> " 'Reasonable cause to apprehend' and the 'immediate danger of accomplishment' of such acts are to be

determined as the circumstances appeared to the Defendant at the time, even though the danger was not real but only apparent.

"You are instructed, therefore, that you may give consideration to the past experiences of the defendant concerning the proclivity of the decedent for physical violence and if you find that Edna Mae Booker, at the time, on March 8, 1965, had reasonable cause and did, in fact, fear that the decedent was approaching her with intent to do her some great personal injury you should find her not guilty."

We do not agree with defendant that the meaning of the phrases "reasonable cause to apprehend" and "immediate danger of accomplishment" is too subtle for a jury's comprehension. Further, we believe under the evidence in this case, concerning the firing of the four shots, the addition of the second paragraph requested by defendant would have removed from the jury's consideration questions which necessarily must be resolved in determining whether defendant's actions were justifiable. Defendant relies on *State v. Livesay*, 71 Idaho 442, 233 P. 2d 432, in support of her argument on this point. In *Livesay*, as here, a wife was charged with first degree murder of her husband and convicted of first degree manslaughter. As in this case, the shooting occurred during an affray resulting from an argument about marital infidelity. The Idaho court reversed, finding error in the instruction on justifiable homicide, as stated in headnote 6:

"In prosecution for first degree murder wherein defendant claimed justifiable homicide, giving instruction that if defendant intentionally put herself where

she knew or believed she would have to invoke aid of self defense she could not claim it regardless of circumstances which intervened was prejudicial error, and error was not cured by other instructions." (p. 443.)

The decision is not persuasive in this case. First, the instruction given here can not be construed as prohibiting resort by defendant to the defense of justifiable homicide. Second, in *Livesay* only two shots were fired. Defendant *Livesay* testified the first was an intentional miss fired, to frighten the victim. The second and fatal shot was fired after the victim had approached defendant and was in bodily contact with her. In the case at bar four shots were fired into the body of deceased, the sequence of the firing, and whether all of the shots were justifiable or fired in self-defense were questions for the jury. According to the testimony of Dr. Neudorfer neither of the two facial shots were fatal but either of the two body wounds would have caused death. From the testimony of Wilda Farley, as she entered the room, the victim was on the floor in a corner and defendant was standing over him and still shooting. From the testimony an inference may be drawn that the two facial shots were fired first and then followed by the two fatal body shots when deceased was already on the floor. The divergence of evidence as to the shooting makes the two cases clearly distinguishable.

Under the evidence developed in the instant case we believe the instruction in question when considered with the instructions as a whole and in particular with the

trial court's comprehensive instruction on self-defense adequately informs the jury of the considerations involved.

Defendant next complains of the trial court's instruction explaining the term "reasonable doubt." The record does not reveal any objection to the instruction before it was submitted nor does defendant raise the point in his motion for a new trial. The question is not entitled to appellate review. (*State v. Freeman,* 198 Kan. 301, 424 P. 2d 261.) Nevertheless, though not required to do so, we have examined the instruction given and find it to be in substantial compliance with instructions on the subject approved by this court in *State v. Killion,* 95 Kan. 371, 148 Pac. 643; *State v. Mullins,* 95 Kan. 280, 147 Pac. 828; *State v. Patton,* 66 Kan. 486, 71 Pac. 480.

Defendant urges error in the admission of testimony concerning defendant's behavior subsequent to the offense charged. The evidence attacked is the testimony of two neighbors who saw Sergeant McElroy at the Booker home a number of times subsequent to the shooting. They saw McElroy's car parked at the Booker house at all times during the day and in the evening on many occasions. Defendant argues such testimony was irrelevant and only offered to raise dirty insinuations or suspicions. The state argues it was relevant and admissible for the purpose of showing motive.

Under the prosecution's theory, as developed by the evidence, we believe the evidence admissible for the purpose of showing motive. It is to be noted that evidence

relevant to prove motive is excepted from the prohibition as to evidence of other crimes or civil wrongs under the provisions of K. S. A. 60-455. In *State v. Scott,* 117 Kan. 303, 235 Pac. 380, a husband was prosecuted for the murder of his wife. The prosecution attributed as a motive an affair between defendant and his niece. Evidence of defendant visiting his niece after the crime was admitted by the trial court and challenged on appeal. This court held:

> "In a case where a husband is charged with the murder of his wife, and the state contends that the motive was defendant's infatuation for and criminal intimacy with another woman, causing defendant to want to get rid of his wife, any evidence of circumstances before or soon after the homicide which fairly tend to establish such infatuation and intimacy, at the time of the homicide, may be received, but evidence of circumstances which only by pure speculation can be said to tend to establish such facts, should not be received." (Syl. ¶ 2.)

See, also *State v. Burton,* 63 Kan. 602, 66 Pac. 633; *State v. Reed,* 53 Kan. 767, 37 Pac. 174, and 1 Jones on Evidence (5th Ed.) § 159, pp. 285, 286.

Finally, defendant claims error in being required to stand trial on a charge of murder in the first degree after having been previously convicted of manslaughter in the first degree in a previous trial when she was tried for first degree murder. The question is settled by our opinion in the recent case of *Cox v. State,* 197 Kan. 395, 416 P. 2d 741, wherein we reexamined the position of this court

with regard to the statutory framework within which a new trial is granted in this state. Further comment is unnecessary.

Defendant also claims error in the trial court's overruling of her motions for discharge and a new trial. With respect to defendant's motion for discharge the record discloses the state offered evidence consisting of the testimony of fifteen witnesses and a taped statement of defendant during a four-day trial. The shooting was admitted, the jury rejected defendant's theory of self-defense and justifiable homicide and likewise the prosecution's theory of first degree murder. There is ample evidence to support the verdict of manslaughter in the first degree.

We find no issues raised in defendant's motion for a new trial that have not been considered and resolved herein. Further discussion would only be repetitious. The record discloses defendant had the benefit of vigorous and competent representation throughout these proceedings. We think a fair trial was had and the judgment must be affirmed.

It is so ordered.

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF KANSAS

State of Kansas, Appellee,

v.

Edna Mae Booker, Appellant.

No. 44,902

You are hereby notified of the following action taken in the above entitled case:

Motion by Appellant for Rehearing is DENIED.

Motion by Appellant to withhold issuance of mandate and to continue bond is DENIED.

Yours very truly,
James R. James
Clerk, Supreme Court

Date January 5, 1968

APPENDIX D

(The following proceedings were had in the judge's library prior to starting the trial, in the absence of the jury panel and with the defendant present.)

MR. SHULTZ: Comes now the defendant and moves the Court for an order discharging her from trial on the charge of first degtee murder and second degree murder, which is to say that it is the position of the defendant that she can only be put through a trial now on the charge of first degree manslaughter and offenses that are lesser and included within that charge, on the grounds that by virtue

of this matter having been heretofore presented to a jury and the jury making a finding of guilty of first degree manslaughter that that finding includes within it a finding of not guilty as to murder in the first degree and murder in the second degree; and for the information of the Court —do you have the citation in the Green case?

MR. KINCH: No, I don't, it is a well known case, Green versus United States, I don't have it with me.

MR. SHULTZ: The case of Green versus the United States that made a determination of this question favorable to the defendant in Federal Court. There is presently pending in the Supreme Court of the United States on certiorari a matter titled Cihos versus Indiana. It should be decided this term and the question there is whether or not the protection of the Fifth Amendment or double jeopardy in circumstances such as this are binding upon the states under the Fourteenth Amendment. I think that is the substance of it, isn't it?

MR. KINCH: Yes.

MR. HILTON: May it please the Court, the information still stands, she is still charged with first degree murder in this case. The Supreme Court's decision, Kansas Supreme Court decision, ruled that she be granted a new trial and that the finding of the jury was a finding of fact finding her guilty of first degree manslaughter. This is an entirely new trial ordered by the Kansas Supreme Court, and our information is on file as to the charge and the charge is

first degree murder, therefore I feel that—there is no Kansas cases that say that I am sure, and I don't believe there is any United States Supreme Court directly in point that when a new trial is granted a defendant which is charged with a greater offense than she had been found guilty of, I believe she has to go back and stand trial for the same offense, it is entirely a new trial under the same information as filed by the State.

MR. SHULTZ: Your Honor, I am in agreement from the standpoint that our Supreme Court, and this is a matter of being fair, our Supreme Court has always prior to this time said that a new trial granted is as if no trial had ever been had. It is our opinion now that with the recent changes in the United States Supreme Court and they are presently considering this situation that it may very well be that their decision will change the law as has been expressed by the Kansas Supreme Court.

THE COURT: Are you through?

MR. SHULTZ: Well, except, as you know, that in matters of this kind our United States Supreme Court has been giving much of that a retroactive effect and we think that it could very well be applicable to this case. And now I am through.

THE COURT: The defendant's motion will be overruled. I think the jury is out there, so let's go. (T 3-5)

APPENDIX E

MR. SHULTZ: Your Honor, lest I forget, or should I say I would like to mend my fence just a little bit, because

the Supreme Court has ruled, they don't always pay attention to it, but they have ruled that matters which are not taken up on the motion for a new trial have no standing in an appeal case. The court will recall as a pretrial motion that the defendant moved the Court to require an amendment of the charge from first degree murder to first degree manslaughter on the grounds that the original verdict of the jury at the first trial of this case by a finding of first degree manslaughter for all intents and purposes found the defendant not guilty of first and second degree murder; and admittedly the State of Kansas prior to this time has never followed that rule, although it has been in force in some jurisdictions and it is—was and is believed pertinent by virtue of the fact that at the time this case came on for the second trial there was a case pending before the United States Supreme Court which has since been argued bearing upon that point, the decision isn't down yet, but it is timed so that even without a retroactive effect if the Supreme Court should make a ruling in favor of the defendant in that case it would very likely control this one. And I want to make my record, I am renewing the argument which I made in the pretrial motion for the purpose of appeal.

THE COURT: On that point, on the last point Mr. Shultz raised, the Court notes that the Supreme Court of the State of Kansas sent this case back to this Court with the following sentence being the last sentence of the opinion, "The judgment is reversed with directions to grant a new trial." And that's exactly what this Court did.

MR. SHULTZ: Yes. Well, Your Honor, I say—I

will agree that our court has followed that rule that you have a trial the same as if none has ever been had and under those rulings this Court was correct, but I do want the point to remain in the record.

THE COURT: The point is made and it is in the record.

MR. SHULTZ: Fine. (T 485-487)